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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 346

CARMINE PANICO,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF—IN REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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1. Preliminarily, we respectfully observe that this Court's decision of October 21, 1963 in No. 45, *Salvatore Panico v. United States*, granting the writ of certiorari, vacating the judgment of the Court of Appeals, and remanding the case to the District Court, has or ought to have a significant impact upon the within certiorari petition of Carmine Panico, the brother of the petitioner Salvatore Panico in No. 45. We would respectfully recall to the Court that in our "Conclusion" to Carmine Panico's petition for certiorari herein (pp. 38-39) we said:

> * * * "It is also submitted that, in the event that the Court is not prepared to grant this petition on the sole and distinct basis of the matters presented herein, the disposition of the petition should be deferred pending the Court's ruling upon the petition of Salvatore Panico pending in No. 633 [i.e., now No. 45]; for, if the latter petition is granted, an

ultimately just and final determination as to the legality of the conviction of Carmine Panico may have to be postponed until after Salvatore Panico shall have had a new hearing as to his mental competency."

The above was written prior to the Court's decision in No. 45. That decision, it is assumed, will result in a new hearing as to the mental competency of Salvatore Panico—unless the Government should elect not to retry the contempt charges against Salvatore, in which event the inference thereby raised that the Government is not prepared to continue challenging Salvatore's claims of mental incompetency would, of course and in itself, operate strongly in favor of the granting of Carmine Panico's within petition for certiorari. The indissoluble connection between the merit or non-merit of Carmine Panico's certiorari issues and Salvatore Panico's mental condition was pointed out in Carmine's petition for certiorari (pp. 2-3, 15-23, 24-25, 28-39). Much if not most of the argument and reasoning in the Government's Brief In Opposition—we refer to the Government's (and both lower Courts') unquestioning assumption that Salvatore Panico's extraordinary conduct during the trial was feigned instead of being the conduct of a mentally disturbed person—has now entirely lost any claim to consideration by this Court in view of the aforementioned decision in No. 45. That is, the Government's (and the lower Courts') position that Carmine Panico's contentions of fatal prejudice stemming from his brother's behavior and the Trial Court's actions in regard thereto lack merit because Salvatore was faking, has now in effect been declared by this Court itself to be an untenable position on the present state of the overall record in No. 45 and in the instant case.

2. We note that the Government has made no presentation to this Court concerning Carmine Panico's Questions Presented Nos. 3, 4 and 9.

3. The Government's statement (Br. in Opp. 5) that the distressing events at the second trial "had their genesis in the first trial" is very unfair in its application to Carmine Panico. The single specification adduced by the Government in support of this statement as regards Carmine Panico, namely, that the latter was "found guilty of contemptuous conduct" at the first trial, is false and indeed has now been repudiated by the Government itself *per* the recent letter of the Solicitor General acknowledging that this is a mistake. Not only were neither of the Panico brothers charged with or found guilty of contempt in connection with the first trial, but the record of that trial may be read in vain for any indication of trouble of any sort from the Panicos. Nor did the Panicos experience any difficulty with representation by counsel at the first trial. The Panicos had no trouble of any sort during that trial, which was conducted by Judge Level, and they caused no trouble. The trouble did not begin until Judge MacMahon came into the picture to handle the pretrial arrangements for the second trial which he was assigned to conduct. It is most unfair, we repeat, for the Government to try to tinge petitioner Carmine Panico with any of the alleged bad coloration of other defendants' conduct during the first trial.

4. Likewise unfair is the Government's treatment of the pretrial happenings after Judge MacMahon's entry (there is no allegation of trouble occasioned by the Panicos during that pretrial phase prior to Judge MacMahon's entry) (Br. in Opp. 6-8). The Government's description (*id.*, 7) of the Panicos' problem of representation by counsel dur-

ing the pretrial is a marvelous over-simplification (see Carmine Panico's petition for certiorari herein at p. 16, where we refer the Court to the full description of these happenings as given on pp. 6-15 of the Panicos' printed brief in the appeal below, copies of which were filed in this Court in No. 45). Less telescoped but not less simplistically unfair is the Government's argumentation on this same pretrial aspect at Br. in Opp. 32-33 (see the references to our petition for certiorari and the Panicos' printed brief in the appeal below cited in the parentheses at the end of our last preceding sentence herein).

5. The Government's description of the disorderly happenings at the second trial and of Judge MacMahon's measures in regard thereto (Br. in Opp. 13-19, 25-32) also does severe injustice to petitioner Carmine Panico, all the more so in view of this Court's recent decision in No. 45 vacating the lower Courts' respective adjudications that Salvatore Panico was faking insanity. It is wrong for the Government to say (Br. in Opp. 17) that on the occasion of Salvatore's most serious misbehavior (his violent foray into the Jury box) "he was seconded by his brother Carmine". This is wrong because what was really happening on that occasion in regard to Carmine was that he was reacting with uncontrollable fraternal distress in the face of the mental agonies of his brother Salvatore (see Pet. Cert. herein p. 17 containing reference to pp. 31-38 of the Panicos' printed brief in the appeal below). It is wrong also for the Government to say (Br. in Opp. 17) that on the day following the above incident the Panicos' counsel "asked for a psychiatric examination of *both* Panicos" (emphasis supplied), and (*id.*, 27) that both Panicos "claimed to be insane". This is wrong because the testi-

mony cited by the Government (Tr. 5679) shows only that Mr. Aronne's request for a psychiatric examination of Salvatore was accompanied by the offhand comment that "I think they are both a little balmy", but there was never any request for psychiatric examination of Carmine and it is preposterous, to anyone who knows this trial record, to say that Carmine Panico ever claimed to be insane. Obviously the Government's purpose in trying to insinuate the opposite is to ridicule the good faith of the request for psychiatric examination as to Salvatore by making it appear that indiscriminate claims of insanity were being asserted. It is also wrong for the Government to say (Br. in Opp. 19) that the Panicos' gags "consisted of a strip of cloth across the mouth". The record is clear that the gags originally placed upon the Panicos included adhesive tape which tore at their flesh (Tr. 6156—and see testimony cited *infra* in this paragraph)—more "comfortable" gags were later ordered by Judge MacMahon. It is also wrong for the Government to gloss over the important detail as to the shackling of the Panicos, which was in addition to their gags—especially the shackling of the petitioner Carmine Panico. There were chains around their stomachs chaining them to the chairs on which they sat, they were handcuffed, and their legs were shackled by leg-irons (Tr. 6088-6091, 6156, 6174-6175, 6319, 6337-6338, 6989-6989a, 6996-6997, 7149, 6971-6988, 7371-7378). See also our petition for certiorari herein pp. 17-23, 35-37. And it is wrong for the Government, in connection with the gagging and the shackling of the Panicos, to gloss over (Br. in Opp. 19, 31-32) the important chronological sequences of the successive physical restraints imposed upon Carmine (see our references in this paragraph *supra* on the subject of gagging and shackling).

6. The Government's discussion (Br. in Opp. 32-33) of our contention that Carmine was denied the right to counsel during the second trial ignores completely the following items which we advanced in our petition for certiorari: (1) The evidence introduced during Mr. Aronne's absence was the vital evidence on the substantive counts which was the indispensable basis for the introduction of the prodigious quantities of the "Orlandino" narcotics with which the Panicos were never connected other than through the associative misfortune of their being "conspiracy" defendants in the trial of this indictment combining substantive and conspiracy counts. (2) The Court-assigned attorney, Mr. Todaro, was also assigned to represent another defendant (Loicano) whose interests were in conflict with the Panicos. (3) Above all, the forced imposition of assigned counsel on the Panicos could only be justified, in view of the perfectly legitimate and necessitous reasons for Mr. Aronne's sudden and unexpected absence and the indicatedly short duration thereof, if a ramrod schedule for this trial was justified; the Government has not met this aspect of the issue at all; see the petition for certiorari recently filed on behalf of Loicano in No. 568, at pp. 50 *et seq.*, quoting from *United States* v. *Johnston*, 318 F. 2d 288 (C.A. 6 1963).

7. The Government's discussion of the evidence (Br. in Opp. 21, 24-25) coat-tails rides the decision of the Court below. That Court, the Government says (p. 21), "carefully considered" the sufficiency of the evidence and the question "merits no further review." (*ibid*). There is not a word in the Government's brief—nor was there in the "carefully considered" opinion of the Court below—about what we respectfully reiterate (Pet. Cert. 8-15) to have

been the crucial question of fatally defective ambiguity in the testimony of the accomplice witness Smith concerning the "he" (Carmine or Salvatore) who allegedly spoke *the sole words in this entire record* (the words about a "run" and "stuff"[5]) *from which any inference could remotely be drawn as to knowledgeful participation in the conspiracy by Carmine Panico* (or by Salvatore). The Government's closest approach to even recognizing the existence in the case of this all-important problem—on whose correct and just resolution depends the validity of the sentence of twelve years imprisonment for a hard-working young family man who has never before been in trouble in his life—is its altogether perfunctory discussion at Br. in Opp., 24-25 of the alleged joint presence of the two Panico brothers on the occasions when alleged packages of narcotics were allegedly delivered at the 1717 Club. From this, the Government grandly concludes that "such regular acceptance of narcotics formed a knowing link in the chain of importation and distribution of narcotics" (*id.*, 25), citing no cases—because there are no cases to support the idea that regular acceptance by "Z" of narcotics from "X" or from "Y" justifies an inference of "Z's" knowledge of a specific alleged conspiracy between "X" or "Y" on one hand and "A", "B", "C", "D", "E", etc., *ad infinitum* on the other hand.

8. The Government's answer to our contention that the Trial Court erroneously ruled that Smith was an accomplice as a matter of law misses our point completely (Br. in Opp., 41), we must respectfully state. After Carmine testified

[5] *N. B.* also: Unless Carmine was proved beyond a reasonable doubt to have been the "he" who spoke of a "run", there is not even proof that he knew what the alleged packages contained!

that he did not know Smith or have any dealings with him (6318-6336), the Trial Court charged the Jury that "he [Smith] is, by his own admission, an accomplice to the very charge against the defendants now on trial. * * *" In the prosecution of a crime, the government is frequently called upon to use persons who are accomplices. * * *. There is no requirement in the federal court that the testimony of an accomplice like Smith be corroborated. Conviction may rest upon the uncorroborated testimony of an accomplice if you believe it and find it credible. * * *." (J 133a, 134a).

This charge by the trial court was equivalent to a direction of a verdict of guilty. The charge completely negated the petitioner's testimony that he was not an accomplice of Smith. This sharp cleavage of testimony on the accomplice issue was one of fact solely for the jury's determination. *Holmgren v. United States*, 217 U.S. 509, 523; *Phelps v. United States*, 252 F. 2d 49, 53 (C.A. 5, 1958); *United States v. Vanco*, 131 F. 2d 123, 126 (C.C.A. 7, 1932); *United States v. Baldilmos*, 177 F. 2d 485, 488 (C.A. 7, 1949); *Ward v. United States*, 296 F. 2d 898, 902 (C.A. 5, 1961). The opinion of the Court below that the appellants misread the charge; that the court correctly restated Smith's testimony that "by his own admission she was an accomplice" to the crime charged and an instruction to scrutinize Smith's testimony with special care was not error (Pet. 49a), does not take into consideration all the comments made by the Trial Court on the accomplice issue and utterly ignores petitioner's contention that this issue was one of fact for the jury to decide. Petitioner's trial counsel took exception to the court's charge (J 221a-222a).

"Mr. Lewis: I also take exception to this remark made by your Honor; that there is no requirement under federal law that the testimony of an accomplice like Smith be corroborated. As a general proposition of law that is correct, but your Honor is now characterizing Smith as a matter of law to be an accomplice.

The Court: Please just state your exceptions, without argument.

Mr. Lewis: I ask your Honor to charge the jury that whether or not Smith is an accomplice is a question of fact and that you have charged them as a matter of law that he is an accomplice.

The Court: Your exception is noted. I decline to make it."

The Trial Court had every opportunity to give a corrective instruction. Its refusal to do so constitutes reversible error. The highly prejudicial effect of the Trial Court's charge in our case recalls the words of *United States* v. *Tomei*, 173 F. 2d 140, 142 (C.A. 3, 1949):

> "* * * If A's admission that he conspired with B is believed, it is pretty hard to avoid the conclusion that B must have conspired with A * * *."

The Trial Court's charge in our case that Smith by his own admission was an accomplice in the perpetration of a crime; that the Government is frequently called upon to use persons who are accomplices; that there is no requirement in the federal courts that the testimony of an accomplice like Smith be corroborated; that conviction may rest upon the uncorroborated testimony of an accomplice if you believe it and find it credible—could leave no doubt in the minds of the jurors that the Trial Court had charged them that Smith was an accomplice. That being so, it would be hard

for the jury to avoid the conclusion that petitioner was an accomplice of Smith. This charge to the jury was erroneous, misleading and prejudicial. Petitioner's guilt was not found by the Jury according to the procedure and standards appropriate for criminal trials in the federal courts. *Bollenbach v. United States*, 326 U.S. 607, 614.

9. The Government has completely missed also our point (Pet. 3, 24), we submit, as to the Trial Court's prejudicial instruction which spotlighted the failure of Salvatore Panico to take the stand (Br. in Opp. 42). After the Trial Court had charged the jury that they were to draw no unfavorable inferences from the failure of any defendant to testify, the Court refused the request of trial counsel to charge the jury that Salvatore Panico wanted to testify but that the Court had refused to permit him to do so (J 222a). As was said by Judge Learned Hand in *United States v. DiCarlo*, 64 F. 2d 15, 18 (C.A. 2, 1933):

> "We should be blind to realities if we supposed that juries are unconscious of the omission of a defendant to take the stand. * * * ".

The two Panico brothers were like two peas in a pod to the Jury. Any error committed as to one of them had a prejudicial effect upon the other. The Court below reversed the conviction of Salvatore because of the Trial Court's refusal to permit him to testify. It should have also reversed as to Carmine because of the above-described impact of this situation on the latter's right to a fair trial.

10. In view of the gross inconsistency of Smith's testimony at the first trial and his grand jury testimony as compared with his testimony at the second trial in relation to petitioner (Pet. 13-14); the many egregious errors com-

mitted by the Trial Court as heretofore recited; and the facts that the only evidence adduced by the government against petitioner came from the mouth of a debased individual who was an extremely well-paid informer as contrasted with the testimony of petitioner who had led an exemplary life and had been steadily employed since the age of sixteen except for the period when he was in the armed forces, who had never been arrested prior to his arrest in this case, who had been employed as a liquor salesman duly licensed by the State of New York, and whose testimony on direct examination was so frank, honest and forthright, that Government counsel waived cross examination. We respectfully submit that the words of *United States* v. *Pa[illegible]*, 305 F. 2d 534, 536 (C.A. 2 1962) are most appropriate.

> "The Government's case rested entirely upon the uncorroborated testimony, inconsistent with his earlier testimony in some respects of an accomplice and co-conspirator who had the strongest possible reasons to become a Government witness. We must therefore scrutinize any claimed error with extreme care since there is a grave possibility of prejudice to the defendants in a case such as this by error which might in other circumstances be deemed relatively minor. (Glasser v. United States, 315 U.S. 60, 67, 62 S. Ct. 457)."

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be granted; and that, in any event, the petition should not be denied until after there shall have been reached a final adjudication or other disposition of the now renewedly pending (pursuant to this Court's decision of October 21, 1963 in No. 45) question of the mental competency of Salvatore Panico.

Respectfully submitted.

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